Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:OHI:CIN:TL-N-3084-00
JEKagy

date:

to: Chief, Examination Division, Ohio District
Attn: Ted Carroll, Examination Group 1103

from: Assistant District Counsel, Ohio District, Cincinnati

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subject: [redacted]
Donation of Corporate Records

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This correspondence memorializes several conversations between this office and Revenue Agent Ted Carroll regarding his faxed inquiry of May 22, 2000 referencing the taxpayer above. The inquiry sought our opinion on the litigation strengths of a proposed issue disallowing the taxpayer's deduction of the full fair market value of certain donated property, namely [redacted] corporate records dating back as far as [redacted].

Although somewhat similar issues have been tangentially addressed by the courts and the National Office in other contexts, the issues raised have not been directly considered or decided. Since we have found no guidance upon which we can rely, we must conclude that the issues raised must be resolved by the National Office in the context of either a request for Field Service Advice or a request for a Technical Advice Memorandum.

ISSUE:

Whether the instant corporate records, donated by [redacted], are properly excluded from the definition of capital assets pursuant to sections 1221(3)(A), (B) or (C).

CONCLUSION:

The issue must be submitted to the National Office as a request for either a Field Service Advice or a Technical Advice Memorandum.

FACTS:

In [redacted], [redacted] and [redacted] formed a partnership which operated in [redacted] as the [redacted]. In [redacted], due to financial difficulties, the company moved to a site in [redacted] owned by new investor [redacted] and changed its name to the [redacted]. Soon thereafter, [redacted] sold their majority interest in the venture to [redacted], who changed the name of the company to the [redacted]. In [redacted], [redacted] reformed the partnership, moved to [redacted] and, with the advent of the [redacted], became one of the [redacted], eventually known as the [redacted].

In [redacted], [redacted] was bought by the [redacted], a diversified manufacturer of general [redacted], [redacted] equipment and [redacted] products. In [redacted], the [redacted], a manufacturing and marketing company, purchased [redacted] and merged the companies. In late [redacted], the [redacted] was purchased by [redacted] in a leveraged buyout, albeit, a friendly takeover. In order to help finance the acquisition, [redacted] immediately put [redacted] on the market on its own merit. In [redacted], [redacted], a diversified maker of industrial and consumer products, became the successful bidder for [redacted], purchasing its stock for approximately $[redacted].

In [redacted], [redacted] donated a large number of [redacted] and boxes of records to the [redacted], a qualified charitable organization. The boxes of records included the books and records of [redacted] dating from [redacted] until [redacted]. The [redacted] return claimed a charitable deduction for the full fair market value of the property donated. The fair market value of neither the [redacted] nor the books and records is in dispute. Rather, at issue is the deductibility of the full fair market value of the books and records.

ANALYSIS:

Subject to certain limitations, a deduction is allowed for any charitable contribution, as defined in section 170(c), which is made within the taxable year. See section 170(a). The term "charitable contribution" is defined to include a contribution to or for the use of a state, any political subdivision of a state, or the United States, or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes (see section 170(c)(1)), and a contribution or gift to or for the use of a corporation, trust or community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (see section 170(c)(2)). We understand that you have accepted the gift at issue as falling within the above definitional language.

As required by the Treasury regulations in effect during the years at issue, if a charitable contribution was made in property other than money, the amount of the contribution was the fair market value of the property at the time of the contribution, reduced as provided in section 170(e)(1) and Treas. Reg. § 1.170A-4(a). See Treas. Reg. § 1.170A-1(c)(1).

If a corporation contributes ordinary income property, as was defined in Treas. Reg. § 1.170A-4(b), the amount of the charitable contribution is reduced by the gain that would have been recognized as ordinary income if the property had been sold by the donor at its fair market value at the time of its contribution to the charitable organization. In statutory terms, section 170(e)(1)(A) requires the amount of any contribution of property be reduced by the amount of gain that would not have been long-term capital gain if the property had been sold by the taxpayer at its fair market value, determined at the time of the contribution. Stated differently, any deduction must be reduced to the extent the sale of the contributed property would have produced ordinary income or short term capital gain.

Whether the amount of the instant charitable contribution must be reduced pursuant to section 170(e)(1)(A) depends on whether the books and records donated constitute capital assets or ordinary assets. Section 1221 defines the term "capital asset" by listing categories that are not capital assets. Section 1221(3) provides, in part, that the term "capital asset" means property held by the taxpayer but does not include a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by (A) a taxpayer whose personal efforts created such property, (B) in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, or (C) a taxpayer in whose hands the basis of such property is determined in whole or in part by reference to the basis of such property in the hands of a taxpayer whose personal efforts created such property, or, in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced.

Three issues must be resolved: (1) whether the instant books and records constitute "other similar property" as that term is used by the statute; (2) whether [redacted] is either "a taxpayer whose personal efforts created such property" or "a taxpayer for whom such property was prepared or produced"; and (3) whether [redacted] is a taxpayer in whose hands the basis of such property is determined in whole or in part by reference to the basis of such property in the hands of a taxpayer whose personal efforts created such property, or, in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced.

Sub-issue 1:

The first issue may be resolved by application of the Treasury regulations. According to Treas. Reg. § 1.1221-1(c)(2), the term "other similar property" includes:

> such property as a draft of a speech, a manuscript, a research paper, an oral recording of any type, a transcript of an oral recording, a transcript of an oral interview or of dictation, a personal or business diary, a log or journal, a corporate archive, including a corporate charter, office correspondence, a financial record, a drawing, a photograph, or a dispatch.

A company's financial and business records, such as those donated here, fit easily within the broad definitional examples provided by the regulation. See, e.g., Rev. Rul. 82-9, 1982-1 C.B. 39 ("scout" tickets generated for a drilling company were "similar property"). See also Transamerica v. United States, 15 Cl. Ct.

420 (1988), aff'd, 902 F.2d 1540 (Fed. Cir. 1990) (it was conceded that corporate records constituted "similar property"). Moreover, the regulation itself has been considered and sustained by the Tax Court. See Chronicle Publishing Co. v. Commissioner, 97 T.C. 445, 449 (1991), citing Glen v. Commissioner, 79 T.C. 208, 214 (1982) and Morrison v. Commissioner, 71 T.C. 683, aff'd, 611 F.2d 98 (5th Cir. 1980).

It is possible that the taxpayer may attempt to argue that another portion of the regulation quoted above specifically exempts the instant records from consideration as noncapital assets. The taxpayer may argue that the last sentence of Treas. Reg. § 1.1221-1(c)(2) requires that the records be treated as capital assets. In that regard, the final sentence of the regulation states:

> This subparagraph does not apply to property, such as a corporate archive, office correspondence, or a financial record sold, or disposed of as part of a going business if such property has no significant value separate and apart from its relation to and use in such business ...

Even if the records at issue had no significant value separate and apart from their relation to and use in [redacted]'s business, a factual matter to which we currently would not be willing to stipulate, the facts you describe did not encompass the sale or disposition of a going business. [redacted] was not sold in this instance but, rather, continued in existence. Since the records at issue were not sold or disposed of as part of the sale of a going business, the sentence in the regulation relied upon by the taxpayer for its argument provides no support for the taxpayer.

We conclude that the donated [redacted] corporate books and records fit within the meaning of the term "other similar property" as used by the Treasury regulation.

Sub-issue 2:

The second issue, whether [redacted] is either "a taxpayer whose personal efforts created such property" or "a taxpayer for whom such property was prepared or produced" is a much more difficult issue to resolve. At issue is whether the multiple previous sales of [redacted] render the [redacted] entity separate and distinct from the "taxpayer" whose personal efforts created the property and from the "taxpayer" for whom the property was prepared.

In order to deny the taxpayer's claimed deduction of the full fair market value of the donated property, the revenue agent must argue and establish that one of the exceptions to section 1221 apply. In other words, the agent must establish that the [redacted] entity is the same "taxpayer" who created the property or is the same "taxpayer" for whom the property was created. From our research, we have concluded that such issues have not been previously addressed by either the Courts or the National Office. Given the several takeovers, sales or dispositions of [redacted], the taxpayer's natural argument is that for purposes of section 1221, the current entity known as [redacted] is not the same taxpayer who created the property or for whom the property was created. As we understand the facts, the EIN of [redacted] changed at least once during this takeover period.

In a somewhat analogous matter, the Tax Court addressed the question of "who is the taxpayer" for purposes of application of section 481(a). See Thomas v. Commissioner, 92 T.C. 206 (1989). More particularly, Thomas addressed the propriety of a claimed benefit exclusion, which benefit was permitted only to the "person or entity who is the taxpayer within the meaning of section 481(a)". At issue was whether a successor entity, which came into existence after the effective date of the statute, was the "taxpayer" for purposes of applying section 481(a), thereby entitling the entity to exclude amounts attributable to pre-1954 tax years. In that context, the Tax Court concluded that the successor entity was not the same taxpayer and no exclusion was permitted. Thomas, 92 T.C. at 230-233.

In addition, we note with caution the existence of Rev. Rul. 55-706, 1955-2 C.B. 300. Although later superceded by Rev. Rul. 62-141, 1962-2 C.B. 182, Rev. Rul. 55-706 appears to provide an alternative argument for the [redacted]'s claim that [redacted] is not the "taxpayer" who created the documents or for whom they were created. In discussing the "other similar property" exception of section 1221(3), Rev. Rul. 55-706 states:

> Many corporations, including some whose stock is widely held and traded on established stock exchanges, create copyrights as well as other property described in paragraph (3) of section 1221. The property created by these corporations is not considered to be created by the personal efforts of a taxpayer where all of the costs and expenses are paid for by the corporation at the current going rate for services rendered. The production of each of the ... [products] ... in the instant case involved a multiplicity of skills and abilities, the combined efforts of numerous individuals

> of various backgrounds and trades, and the use of substantial amounts of capital. Thus, no single individual may be said to have created by his personal efforts the ...[property] ... in question.

1955-2 C.B. at 301-302.

Although the ruling was superceded in 1962, since being superceded, the quoted language above has been referenced favorably by the Service at least once (see P.L.R. 8042121) and in passing by the Tax Court (see Martin Ice Cream Company v. Commissioner, 110 T.C. 189, 230 (1998)). Still, there are neither cases nor National Office guidance addressing this specific point. This lack of case law or National Office guidance causes us to conclude that the resolution of this issue requires either a request for Field Service Advice or a request for a Technical Advice Memorandum.

Sub-issue 3:

In order to resolve the third issue, i.e. whether [redacted] is a taxpayer in whose hands the basis of the books and records is determined in whole or in part by reference to the basis of such property in the hands of a taxpayer whose personal efforts created such property, or, in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, more facts are required. In addition to legal issues involving the effect of the intervening owners of [redacted] and the effect of the position articulated in Rev. Rul. 55-607, we believe that factual questions exist which require you to determine the nature, scope and effect of each intervening takeover, purchase or acquisition of [redacted]. Until the Service has determined the factual and legal ramifications of each sale or disposition of [redacted], we do not believe the resolution of the third issue can be obtained.

As with the prior issue, we were able to find neither case law nor National Office guidance regarding the application of the instant exception. As a result, we believe that once the factual development of the issue is complete, this issue too should be the subject of either a request for Field Service Advice or a request for a Technical Advice Memorandum.

Once the factual aspects of the issues are resolved, if you wish our assistance in preparing the submission of the issues to National Office, we stand ready to assist you.

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By: ______________________
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